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Supreme Court of the United States

OCTOBER TERM, 1958

No. 661

UNITED STATES OF AMERICA, Petitioner

v.

ELMER B. WIGGINS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONDENT'S PETITION FOR REHEARING

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Counsel for Respondent

Supreme Court of the United States

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RESPONDENT'S PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Now comes Hayden C. Covington, one of the attorneys for respondent, and files this his petition for rehearing in this case. The Court is requested to set aside the order denying certiorari and, upon a consideration of this petition, the Court is requested to grant the writ and set the case down for argument and submission. The reason for this petition for rehearing shall now be stated.

I.

Counsel for the respondent is of the opinion that he did not, nor did the Solicitor General, demonstrate fully the

importance of the question presented in this case. A more detailed statement of the facts showing the national importance of this case would have, in the opinion of the undersigned counsel for respondent, persuaded this Court to grant the writ of certiorari, because it is clear that the question is of national magnitude and is of great public importance to (1) the organization known as Jehovah's Witnesses, (2) the Selective Service System, (3) the Department of Justice; and, (4) all the federal courts in the United States, including this Court, involving the application and enforcement of Section 6(g) (50 U.S.C. App. § 456(g)) and Section 12(a) (50 U.S.C. App. § 462(a)) of the Universal Military Training and Service Act. See brief for respondent in this case at pages 3-4 for the statutes here cited.

II.

The table printed in the back of the petition for writ of certiorari at page 42 shows that approximately 898 book study conductors of the organization known as Jehovah's Witnesses are men of draft age. Heretofore no Court of Appeals (save and except the court below in the *Wiggins* case) has determined that a book study conductor, whose duties do not require full time devoted to the ministry and which allow the performance of full-time secular work, is entitled to the exemption.

There are a large number of holdings in various Courts of Appeals that an ordained minister of Jehovah's Witnesses, who is nevertheless a leader performing full-time secular work and not devoting exclusively full time to the ministry, is not entitled to the exemption.—*Swaczyk* v. *United States*, 156 F. 2d 17 (1st Cir. 1946) (cert. denied 329 U.S. 726); *United States* v. *Hagaman*, 213 F. 2d 86 (3rd Cir. 1954); *Baxley* v. *United States*, 134 F. 2d 937 (4th Cir. 1943); *Goff* v. *United States*, 135 F. 2d 610 (4th Cir. 1943); *Homiker* v. *United States*, 135 F. 2d 613 (4th Cir. 1943); *Martin* v. *United States*, 190 F. 2d 775 (4th Cir.

1951) (cert. denied 342 U. S. 872); *Capehart* v. *United States*, 237 F. 2d 388 (4th Cir. 1956) (cert. denied 352 U. S. 97); *Battecali* v. *United States*, 130 F. 2d 172 (5th Cir. 1942); *Neal* v. *United States*, 203 F. 2d 111 (5th Cir. 1953) (cert. denied 345 U. S. 996); *Checinski* v. *United States*, 129 F. 2d 461 (6th Cir. 1942); *Rase* v. *United States*, 129 F. 2d 204 (6th Cir. 1942); *Wolfe* v. *United States*, 256 F. 2d 434 (6th Cir. 1958) (cert. denied 79 S. Ct. 30 (No. 3)); *United States* v. *Hill*, 221 F. 2d 437 (7th Cir. 1955) (cert. denied 349 U. S. 964); *United States* v. *Diercks*, 223 F. 2d 12 (7th Cir. 1955) (cert. denied 350 U. S. 841); *Seele* v. *United States*, 133 F. 2d 1015 (8th Cir. 1943); *Bradshaw* v. *United States*, 242 F. 2d 180 (10th Cir. 1957).

The determination for the Government as to what cases (involving registrants claiming exemption as ministers of religion) shall be prosecuted is by agreement between the Department of Justice and the Director of the Selective Service System to be recommended by the Director.

General Lewis B. Hershey, Director of the Selective Service System, through his General Counsel, Colonel Daniel O. Omer, has informed the undersigned counsel for respondent that he will not accept as the law the decision of the Court of Appeals in *Wiggins* v. *United States*, 261 F. 2d 113 (5th Cir. 1958), and that he is going to persist in his present policy to recommend prosecution of all leaders of Jehovah's Witnesses who are shown to be of that class of servants mentioned at pages 39-42 of the petition for writ of certiorari. This would include a total of approximately 3,000 men who are of draft age.

There is only one circuit in the country—the Fifth Circuit—where, in the district courts, the *Wiggins* decision can be relied upon as a basis for a judgment of acquittal of such servants above identified. All the other circuits cannot be depended upon to follow the decision in *Wiggins* v. *United States*, 261 F. 2d 113 (5th Cir. 1958). The reason is that denial of certiorari by this Court, as has often been said, means nothing helpful to the bench or bar in-

terested in a resolution of the problem and does not indicate approval by this Court of the holding in the *Wiggins* decision below, so that it can be used as authority in the proposed prosecutions by the Director of Selective Service of the servants of Jehovah's Witnesses described at pages 39-42 of the petition.

This means that Jehovah's Witnesses are confronted with a multiplicity of prosecutions in many of the circuits of the United States involving the identical question that is now before the Court in this case. It is in the interest of justice to clarify the law at *this time* and in *this case*, rather than wait until some later time, perhaps years later, after many prosecutions have been instituted producing a multitude of convictions and perhaps unnecessary appeals.

A prime consideration of this Court in the exercise of its certiorari jurisdiction is to timely settle the law in an important problem that will be recurring and thus prevent a multiplicity of lawsuits and subsequent appeals followed by certiorari applications to this Court. If this Court were to reconsider this case and grant the petition for writ of certiorari because of the importance of the question presented, it would be in the interests of justice and also in the national interest. The reason is that it will settle the law and not throw—as the action of this Court does—the Selective Service System and Jehovah's Witnesses into a nationwide contest in all of the circuits outside of the Fifth, as to whether the decision of the court below is to be the law of the land in other similar cases arising in other circuits.

The granting of certiorari and the determination of the question involved in this case will save the needless expenditure of great sums of money by registrants, in the same circumstances of Wiggins, to be paid out for counsel fees and appellate court costs. It will also save the Government (both the Selective Service System and the Department of Justice) a tremendous amount of time and money if the Court were to grant the writ of certiorari and settle the question involved in this case.

III.

In view of the stated determination of the Director of the Selective Service System (who has charge of making the policy as to which persons reported as delinquents by local boards shall be recommended for prosecution throughout the United States) that he is going to authorize prosecution of several hundred, if not thousands of leaders of Jehovah's Witnesses who are not full-time servants or congregation servants, it is imperative that this Court reconsider its ruling. The threatened and impending multiplicity of prosecutions of Jehovah's Witnesses throughout the country as the result of the refusal of the Director of Selective Service System to accept the decision in *Wiggins v. United States*, 261 F. 2d 413 (5th Cir. 1958), presents a serious and important question in the administration of the Act which should move this Court to reconsider its denial of the writ of certiorari in this case.

It would be an unfortunate thing, producing a needless expenditure of time and money by all parties concerned, if this Court should delay resolution of this question until some other criminal prosecution under the Act has been taken in from some other circuit several years hence and after much money, time and energy of everybody involved has been expended.

The misfortune that the parties are subjected to by a postponement of the resolution of the question here involved by this Court until some later year is overshadowed by the consumption of time and energy of the judges of the District Courts and of the Courts of Appeals in such hundreds of threatened and impending cases until such time as this Court takes this question in and resolves it, as in justice ought to be done now in this case.

CONCLUSION

WHEREFORE, it is submitted that, upon a consideration of this petition, a rehearing should be granted, the order denying certiorari should be set aside and certiorari should be granted; the case should then be placed upon the regular docket for argument and submission for the reasons stated at page 29 of the brief for the respondent; and that, following full argument, the case be resolved in a manner directed by the law of the land.

Respectfully,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Respondent

March, 1959.

CERTIFICATE

This petition for rehearing is filed upon intervening circumstances of substantial and controlling effect and also other substantial grounds are available to respondent, not previously presented, in that (1) the Director of Selective Service has, since the denial of certiorari in this case, indicated his determination not to be bound by the decision in *Wiggins* v. *United States*, 261 F. 2d 113 (5th Cir. 1958), and the denial of certiorari seeking a review thereof by this Court, and (2) the great national and public importance of this question, which, as to the religious group known as Jehovah's Witnesses, was not made clear in either the petition for writ of certiorari or the brief in opposition thereto.

This petition for rehearing is presented in good faith and not for the purpose of delay, and it is restricted to the grounds above specified.

HAYDEN C. COVINGTON
Counsel for Respondent